



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

999 18TH STREET- SUITE 300

DENVER, CO 80202-2466

Phone 800-227-8917

<http://www.epa.gov/region08>

DEC 27 2005

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

#7005-0390-0000-4846-6145, #7005-0390-0000-4846-6152

#7005-0390-0000-4846-6169

Ref: 8ENF-W

Westport Oil and Gas Company, L.P.
1670 Broadway, Suite 2800
Denver, CO 80202

Westport Oil and Gas Company, L.P.
c/o CT Corporation System
1720 Carey Ave., Suite 200
Cheyenne, WY 82001

Westport Oil and Gas Company, L.P.
c/o David A. Hager, President
WHG, Inc.
1670 Broadway, Suite 2800
Denver, CO 80202

Re: Findings of Violation and Administrative Order for
Compliance,
Docket No. CWA-08-2006-0008

Dear Madam or Sir:

Based on our review of all available information, the United States Environmental Protection Agency ("EPA") has determined that Westport Oil and Gas Company, L.P. ("Respondent"), is in violation of sections 301 and 404 of the Clean Water Act, as amended ("CWA"), 33 U.S.C. §§ 1311 and 1344. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344. Section 404 of the CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers ("Corps") prior to the discharge of dredged or fill material into waters of the United States. See,



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33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 40 C.F.R. § 122.2 and 33 C.F.R. § 328.3.

Specifically, EPA has determined that the Respondent discharged dredged and/or fill material during construction of two natural gas well pads, and associated access roads and connecting pipelines at the Lincoln County, Wyoming site without first obtaining an appropriate section 404 permit from the Corps. These discharges of pollutants into wetlands adjacent to the Hams Fork River have occurred on property located in Section 29, Township 20 North, Range 112 West, near Granger, Lincoln County, Wyoming.

Enclosed please find a document entitled "Findings of Violation and Administrative Order for Compliance" ("Order"), which specifies the nature of the violations and describes actions necessary in order for the Respondent to achieve compliance with sections 301 and 404 of the CWA. Pursuant to this Order, within five days after Respondent's receipt of this Order, Respondent must inform EPA in writing of its intent to fully comply with the Order. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA, 33 U.S.C. § 1319, authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that failure to comply with the requirements of the Order is a violation of that Order and may be enforced through the mechanisms referenced above. Please also be advised that the issuance of this Order does not preclude civil or criminal actions in U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the Order or for any other violations that Respondent may have committed prior to or may commit after the issuance of the enclosed Order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). SBREFA does not eliminate Respondent's responsibility to comply with the Act or the Order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.



Please review the Order carefully. If you have any questions, the most knowledgeable people on my staff are Sheldon Muller, Enforcement Attorney, at 303-312-6916, and Kenneth Champagne, Section 404 Enforcement Officer, at 303-312-6608.

Sincerely,



Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Section 404 Findings of Violation and Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Ed G. Schicktanz, Kerr-McGee Rocky Mountain Corporation, w/enclosures
David LaGrone, U.S. Army Corps of Engineers, w/enclosures
Matthew A. Bilodeau, U.S. Army Corps of Engineers, w/enclosures
Tina Artemis, EPA, 8RC, w/enclosures



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY** 2005 DEC 27 AM 8:26
REGION 8

FILED
EPA REGION VIII
HEARINGS CLERK

IN THE MATTER OF:

**Westport Oil and Gas Company, L.P.
1670 Broadway, #2800
Denver, Colorado 80202**

Respondent.

**FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR
COMPLIANCE**

Docket No. CWA-08-2006-0008

I. STATUTORY AUTHORITY

1. This Findings of Violation and Administrative Order for Compliance ("Order") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

2. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

3. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to

issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

4. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, rock, and sand.

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

8. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

9. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

11. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, partnership [or] association."

12. Respondent Westport Oil and Gas Company, L.P. ("Westport") is a limited partnership organized under the laws of the State of Delaware and authorized to conduct business in the State of Wyoming. Westport's mailing address is 1670 Broadway, Suite 2800, Denver, Colorado 80202, whereas its registered office address is 1720 Carey Avenue, Suite 200, Cheyenne, Wyoming 82001. As of March 14, 2005, Westport was a wholly-owned subsidiary of Kerr-McGee Corporation ("Kerr-McGee").

13. At all relevant times, Westport owned, leased and/or otherwise controlled property adjacent to the Hams Fork River located in Section 29, Township 20 North, Range 112 West, Lincoln County, Wyoming (the "Site").

14. The Hams Fork River is tributary to the Black's Fork River, which is tributary to the Green River. The Green River is, and was at all relevant times, interstate waters.

15. In or around April 2004, Westport and/or persons acting on its behalf began construction of an access road for a proposed natural gas well pad ("Bruff 4-29"). Bruff 4-29 and its associated access road and connecting pipelines was completed in or around January 2005. In or around December 2004, Westport and/or persons acting on its behalf began construction of an access road for a second natural gas well pad ("Bruff 5-29"). Bruff 5-29 and its associated access road and connecting pipelines was completed in or around January 2005.

16. During the course of the construction of the natural gas well pads, access roads and connecting pipelines referred to in paragraph 15 of Section II of this Order, Westport and/or

persons acting on its behalf discharged dredged or fill material, including dirt, dredged spoil, rock, and sand, into wetlands.

17. On or about June 6, 2005, Westport's consultant, Ottertail Environmental, Inc., conducted a wetland delineation to estimate potential wetlands filled by construction of Bruff 4-29 and Bruff 5-29, and their associated access roads and connecting pipelines. Ottertail Environmental, Inc.'s June 2005 report titled "Wetland Assessment for Bruff 4-29 and 5-29 Pads, Access Roads, and Pipelines Near the Hams Fork River," found that 2.94 acres of wetlands were filled during construction of Bruff 4-29 and 5-29 pads, access roads, and connecting pipelines.

18. On or about June 21, 2005, representatives of Ottertail Environmental and the Kerr-McGee Rocky Mountain Corporation, another wholly-owned subsidiary of Kerr-McGee, met with representatives of the U.S. Army Corps of Engineers' ("Corps") Wyoming Regulatory Office to discuss Westport's failure to obtain a section 404 permit for the discharges associated with construction of Bruff 4-29 and 5-29 pads, access roads, and connecting pipelines.

19. By letter dated June 29, 2005, the Corps found, and EPA through issuance of this Order finds, that Respondent's actions, as described in paragraph 15 of Section II of this Order, required prior Corps authorization and that the required authorization had not been granted. Further, the Corps directed Respondent to "cease and desist" any further unauthorized work at the Site.

20. On July 19, 2005, the Corps conducted an inspection of the Site to confirm the findings of Westport's June 2005 wetland delineation. The Corps found, and EPA through issuance of this Order finds, that Respondent and/or persons acting on its behalf discharged

dredged and/or fill material into waters of the United States during construction of Bruff 4-29 and 5-29 pads, and their associated access roads and connecting pipelines. The Corps confirmed that 2.94 acres of wetlands had been filled with dredged and/or fill material without authorization.

21. The activities described in paragraphs 15 and 16 of Section II of this Order were performed using common earthmoving vehicles and equipment, all of which were operated by Respondent and/or by persons acting on its behalf.

22. Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

23. The discharged dredged and/or fill material referenced in paragraph 16 of Section II of this Order are, and were at all relevant times, "dredged material" and/or "fill material" within the meaning of 33 C.F.R. §§ 323.2(c) and 323.2(e), and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

24. The Hams Fork River and its adjacent wetlands that were filled and disturbed by Respondent's unauthorized activities provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

25. The vehicles and equipment described in paragraph 21 of Section II of this Order are and were at all relevant times each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. The Hams Fork River and its adjacent wetlands, the Black's Fork River and the Green River are and were at all relevant times "waters of the United States" within the meaning

of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

27. The placement of dredged or fill material into the Hams Fork River or its adjacent wetlands constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

28. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 15 of Section II of this Order.

29. The activities conducted by Respondent and/or persons acting on its behalf as described in paragraphs 15 and 16 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

30. The removal of the dredged and fill material illegally discharged into waters of the United States as described in paragraphs 15 and 16 of Section II of this Order and restoration of the impacted waters, including the Hams Fork River and its adjacent wetlands, to a condition that closely approximates their condition and function prior to the discharge of the dredged and fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

31. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 30 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.

32. This Order was issued after consultation and coordination with the United States Army Corps of Engineers, Omaha District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondent shall immediately terminate all discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Within five (5) calendar days of receipt of this Order, Respondent shall inform EPA in writing of Respondent's intent to fully comply with the Order. EPA requests that

Respondent meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondent's responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondent by EPA.

3. Upon EPA approval of the Restoration Plan required by paragraph 7 of Section III of this Order, Respondent shall remove all dredged and fill materials that were discharged as a result of the violations identified in this Order and restore the Hams Fork River and its adjacent wetlands to their pre-impact condition and grade, unless otherwise approved by EPA in the Restoration Plan.

4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved Restoration plan prepared by a consultant experienced in wetland restoration whose qualifications are acceptable to EPA. The consultant also shall directly supervise all work performed pursuant to the EPA-approved Restoration Plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

5. All dredged and fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration whose qualifications are acceptable to EPA. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

6. Within ten (10) calendar days of any disapproval by EPA of the qualifications of the consultant or equipment operator referenced in paragraphs 4 and 5 of Section III of this Order, Respondent shall submit the professional resume of another qualified individual for approval by EPA.

7. Within forty-five (45) calendar days of the receipt of this Order, Respondent shall submit to EPA for review a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, providing for the: (1) removal of all dredged or fill material that was deposited into the Hams Fork River and its adjacent wetlands or other waters of the United States as a result of the construction of Bruff 4-29 and 5-29 pads, and their associated access roads and connecting pipelines, or any other activity performed at the Site; and (2) restoration, to their pre-impact condition, of all wetlands, the Hams Fork River, and other waters of the United States that were impacted by the construction of Bruff 4-29 and 5-29 pads, and their associated access roads and connecting pipelines, or any other activity performed at the Site.

8. The Restoration Plan shall be prepared in accordance with "U.S. Environmental Protection Agency, Region 8 - Clean Water Act § 404 Enforcement: Removal/Restoration Plans and Habitat Mitigation/Monitoring Proposals," attached hereto as Exhibit A, and with the guidelines referenced in section 404(b)(1) of the CWA, 33 U.S.C. § 1344(b)(1), and set forth in 40 C.F.R. Part 230. In addition, the Restoration Plan shall include:

a. A detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) calendar days after EPA approves the Restoration Plan;

b. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;

c. Grading, planting, and monitoring plans, measurable criteria for success of restoration, and provisions for proper disposal of any excess soils or other materials generated during construction and restoration;

d. Detailed professional drawings of all of the work to be accomplished by the Restoration Plan, including plan and profile drawings with contour elevations; and

e. A description of all costs necessary to complete the work to be accomplished by the Restoration Plan, including the costs of all studies, consultations, permits, monitoring, and construction.

9. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondent shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

10. Upon receiving EPA's written approval of the Restoration Plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence all restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

11. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondent shall obtain such permit(s) and provide a copy to EPA pursuant to paragraphs 10 and 12 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Wyoming Regulatory Office
2232 Dell Range Boulevard, Suite 210
Cheyenne, Wyoming 82009-4942
Telephone: (307) 772-2300

12. Respondent shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Kenneth Champagne, 8ENF-W
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6608
Facsimile: 303-312-6409

A copy of the Restoration Plan, all notifications, and related correspondence shall also be provided to:

Sheldon H. Muller, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6916
Facsimile: 303-312-6953

13. In addition to the notification requirement set forth in paragraph 12 of Section III of this Order, after issuance of any Corps authorization for restoration work, Respondent shall

submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

14. Any deliverables, plans, reports, specifications, schedules and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

15. If Respondent leases, subleases or transfers control and/or ownership of, in whole or in part, any property where work is to be performed pursuant to the Restoration Plan before it has fulfilled their obligations under this Order, the Respondent shall provide a copy of this Order and the EPA-approved Restoration Plan to the lessee, sublessee or transferee not less than thirty (30) calendar days prior to the lease, sublease or transfer. A lease, sublease or transfer of such property interest shall not relieve the Respondent of any responsibility in the Order unless EPA, Respondent, and the lessee, sublessee or transferee agree in writing to allow the lessee, sublessee or transferee to assume such responsibility. Additionally, at least thirty (30) calendar days prior to such lease, sublease or transfer, Respondent shall notify EPA regarding the details of the lease, sublease or transfer at the addresses specified in paragraph 12 of Section III of this Order.

16. Respondent shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Wyoming Game and Fish Department, and the Wyoming Department of Environmental Quality, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;

- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

17. This Order shall be effective upon receipt by Respondent.

18. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation which occurred on or before March 15, 2004, and \$32,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a), including this Order. Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

19. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondent of its obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondent to complete the tasks described herein in the manner and time

frame specified pursuant to this Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 22nd day of December, 2005.

A handwritten signature in cursive script, appearing to read "Carol Rushin", is written over a horizontal line.

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

EXHIBIT A

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 8

CLEAN WATER ACT § 404 ENFORCEMENT: REMOVAL/RESTORATION PLANS AND HABITAT MITIGATION/MONITORING PROPOSALS

INTRODUCTION

These guidelines are designed to assist respondents in the preparation of (1) removal and restoration plans and (2) habitat mitigation and monitoring plans associated with projects required under EPA administrative orders. They have been developed from the experiences of many cases and are intended to be merely guidelines. In the event of a conflict between an administrative order and these guidelines, the administrative order controls.

For answers to questions regarding the interpretation of these guidelines or of acceptable restoration and mitigation for a specific project, please contact the person at EPA Region 8 in the Technical Enforcement Program who is handling the case.

2. Proposed Physical Conditions

- A. Using the site plan described in Subsection 1.A. as a base, show the exact areas where remedial activities will occur (e.g., removal of fill, replacing dredged material into ditches, etc.). Indicate proposed finished grades, expected ordinary high water elevations, the location of proposed plantings/seedings, and the location of all sediment and erosion control structures (e.g., hay bales, silt screens, etc.). This plan shall include a cross-section view of the site which shows proposed soil depths and average depth to groundwater across the site.
- B. Provide a narrative description of the remedial work to occur, including the methods and equipment to be employed; how access to the site to perform the work will be obtained; how equipment will be brought to the site; the location of the ultimate disposal site for any removed fill; how the work will progress across the site; a listing of the plant species to be seeded/planted at the site; the sources of the plant material [*note: as a rule, transplanting of plant stock will not be permitted*]; the planting method(s) and scheme (i.e., physical layout of the how plant material will be installed); any methods to be used to minimize adverse impacts while remedial work is underway; the expected hydrologic regime of the site in its restored condition; and other relevant information.
- C. Delineate the area(s) on the site to be restored by installation of flagging, sedimentation and erosion control structures, or other appropriate method. This delineation shall represent the limit of construction activities such that no work shall occur beyond those boundaries.

3. Actual Restored Physical Conditions

Using the site plan described in Subsection 1.A. as a base, show the actual physical conditions to exist at the site at the completion of grading activities (i.e., as "as-built" plan), including actual finished grades and all pertinent ground surface features. This plan shall include a cross-section view of the site which shows actual soil depths and average depth to groundwater across the site. This as-built plan shall be prepared and submitted prior to planting/seeding activities.

4. Monitoring/Measures of Success

- A. Normally, monitoring shall be performed midway through and near the end of the first and second growing seasons, then annually near the end of each successive growing season for the duration of the required monitoring period. Monitoring shall be performed for a period of three to

CLEAN WATER ACT § 404 ENFORCEMENT:

GENERAL GUIDELINES FOR DEVELOPMENT OF HABITAT MITIGATION AND MONITORING PROPOSALS

I. GENERAL INFORMATION

Submission of a mitigation and monitoring proposal as described in these guidelines will not be a substitute for complete compliance with the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Mitigation under the Clean Water Act Section 404(b)(1) Guidelines dated November 7, 1989, which took effect on February 7, 1990. Therefore, mitigation proposals will only be considered if avoidance and minimization have been fully pursued.

Although all the individual components presented here may not be applicable to every project, a proposal should address each heading in the guidelines. Appendix A provides text and figure format guidelines.

II. PLACE OF MITIGATION AND MONITORING PROPOSAL IN CLEAN WATER ACT § 404 PERMIT PROCEDURE

1. Individual Permit

If a respondent is applying for an individual permit from the U.S. Army Corps of Engineers (the "Corps") and proposes mitigation, it is preferable that a preliminary mitigation and monitoring plan be submitted along with application materials. A detailed preliminary mitigation plan should generally not be completed until a final jurisdictional map has been accepted by EPA, and the area of fill to be mitigated for has been identified. The final mitigation plan will usually be submitted following the public comment period and Corps review of the preliminary plan.

2. Nationwide Permit

If a respondent is requesting confirmation of a project's qualification for a Corps nationwide permit and proposes mitigation, a detailed mitigation and monitoring plan must be submitted with the request for confirmation.

3. Final Submission

The final submission of all mitigation and monitoring plans must be in a *single* document. It must contain up-to-date versions of all materials, even if other versions were submitted earlier in the application process.

5. IMPLEMENTATION PLAN

- A. Rationale for Expecting Implementation Success
- B. Responsible Parties
- C. Site Preparation
- D. Planting Plan
- E. Schedule
- F. Irrigation Plan
- G. As-Built Conditions

6. MAINTENANCE DURING MONITORING PERIOD

- A. Maintenance Activities
- B. Responsible Parties
- C. Schedule

7. MONITORING PLAN

- A. Performance Criteria
- B. Monitoring Reports
- C. Annual Reports
- D. Schedule

8. COMPLETION OF MITIGATION

- A. Notification of Completion
- B. Corps Confirmation

9. CONTINGENCY MEASURES

- A. Initiating Procedures
- B. Alternative Locations for Contingency Mitigation
- C. Funding Mechanism
- D. Responsible Parties

VI. DETAILED RECOMMENDED MITIGATION AND MONITORING PROPOSAL FORMAT

Detailed information to be included in each subsection of the mitigation and monitoring proposal is presented below. The nine subsections should be preceded by a one-page summary of the report contents.

Water Quality

- ground water
- recharge/discharge
- flood storage
- other

Habitat

- rare/threatened/endangered species
- known or probable wildlife use
- plant communities
- complete species list
- known or probable fish, shellfish, and aquatic vertebrate use
- other

Recreational Use

- non-consumptive (e.g., birdwatching, walking)
- consumptive (e.g., fishing, hunting)

2. GOAL(S) OF MITIGATION

This refers to the long-term goals, which may not be reached until some years after the applicant's mitigation responsibilities have been completed.

A. Type(s) of Habitat to be Created

If out-of-kind, present rationale. (Refer to Subsection 1.E.1 above.)

B. Functions and Values of Habitat to be Created

Identify, describe, and provide location of any local reference site if different from the wetland to be filled. (Refer to Subsection 1.E.2. above.)

C. Time Lapse

Describe how many years it is likely to take for the long-term goal habitat to develop.

3. FINAL SUCCESS CRITERIA

These are the criteria that are proposed by the applicant for Corps approval and are used to determine completion of permittee's mitigation responsibilities. Fulfillment of these criteria should indicate that the mitigation area is progressing well toward the habitat

B. Ownership Status

1. Indicate who presently owns the mitigation site. If any owner is different from the permit applicant(s), describe and explain the availability of the property. Describe and explain any easements or encroachments that the property carries. If any of the property is located on public land, describe and explain what arrangements, if any, have been discussed with the managing agency.
2. Indicate expected ownership of the mitigation area following completion of the mitigation project. Identify who will be responsible for long-term management and protection of the area. Describe and explain what if any long-term management plan been prepared for the area. If an entity other than the applicant will assume management responsibilities following completion of mitigation project, describe and explain any signed, written agreement that the manager will manage the area in conformance with goals of the mitigation. Include copies of any written plans or agreements.
3. Indicate what entity, if any, controls water flow to or from the site. Identify and describe the party who is to maintain water control structures. Describe and explain what arrangements have been made to guarantee appropriate water flow in the mitigation area during and after the establishment of the mitigation project.

C. Existing Functions and Values of Mitigation Area

(Refer to Section I.E. above.)

D. Present and Proposed Uses of Mitigation Area

Briefly describe all known present and proposed uses of the mitigation area. Discuss non-native landscape plantings, pipelines, powerlines, roads, distance and location of nearest structures, if any, etc., on the property containing the mitigation site.

E. Jurisdictional Delineation (if applicable)

Describe any jurisdictional areas that are already present on the mitigation site. Provide a topo base map of the site with jurisdictional areas (and any proposed fill) indicated. Describe the probable future of the mitigation area as habitat if left undisturbed.

D. Planting Plan

1. Briefly describe the planting plan and methods
2. Provide a table of species to be planted, including numbers, spacing, types of propagules, pot sizes, etc.
3. Indicate the source-locale of seeds, plant plugs, cuttings, etc.
4. Show planting and species locations on a base topo map. (See Appendix A for figure format information.)
5. If transplanting is to be done, describe the storage method and duration.
6. Describe any expected volunteer native revegetation that is included in mitigation planning.

E. Schedule

Provide a schedule in the form of a legible flow chart showing intended timing of site preparation and plantings.

F. Irrigation Plan

1. Describe irrigation method(s), estimated frequency, and amount during dry months.
2. Indicate water source(s) for the mitigation area.
3. Show the planned irrigation system and/or water flow on base topo (may be included on the planting plan map).

G. As-Built Conditions

The plan should specify that the applicant will:

1. Submit a report to EPA within 6 weeks of the completion of site preparation and planting, describing the as-built status of the mitigation project. If avoidance is incorporated into development project design, describe the as-built status of the development project, including and deviations from the original plan in the vicinity of, or that will affect, jurisdictional area(s). Submit separate reports for grading and planting work if not completed within six weeks of each other.

When percent cover estimates are made of herbaceous vegetation, photographs shall be taken of sampling quadrants.

C. Annual Reports

1. Annual reports shall be submitted which present monitoring results. They shall assess both attainment of yearly target criteria and progress toward final success criteria.
2. Annual reports shall include the following:
 - a. A list of names, titles, and companies of all persons who prepared the content of the annual report and participated in monitoring activities for that year.
 - b. A copy of any Corps permit attached. Special Conditions and any subsequent Letters of Modification shall be included as an appendix.
 - c. Analysis of all quantitative monitoring data.
 - d. Prints of all included monitoring photographs (photocopies are not acceptable).
 - e. Maps identifying monitoring areas, transects, planting zones, etc., as appropriate. (See Appendix A for figure format information.)
3. Copies of all field data sheets shall be available for Corps review as needed.

D. Schedule

Since planting and/or site modification may not occur when planned, monitoring and performance criteria shall be tied to the actual implementation date rather than to predetermined years (e.g., the first annual report shall be delivered on (month, day) of the year following the first growing season after planting.)

8. COMPLETION OF MITIGATION

A. Notification of Completion

When the initial monitoring period is complete, and if the applicant believes that the final success criteria have been met, the applicant shall

APPENDIX A – FORMAT INFORMATION

A. Text Format Notes for Mitigation/Monitoring Proposals, As-Built Reports, and Annual Reports.

1. The Corps file number and the date of the report should be included in title-page reading.
2. Include a distribution page listing names, titles, companies/agencies and addresses of all persons/agencies receiving a copy of the report.

B. List of Figures to be Submitted

(Page and section numbers in parentheses indicate location of figure request in annotated outline. For recommended figure formats, refer to Section (C) below.)

1. Mitigation and Monitoring Proposal
 - a. Jurisdictional Areas and Proposed Fill on Project Site (*p. 8, 1.D.*) (outlines and acreages indicated.).
 - b. Location and Size of Mitigation Area
 - U.S.G.S. quad map (*p. 10, 4.A.2*)
 - road map (*p. 10, 4.A.2*)
 - topo map (*p. 10, 4.A.2*)
 - c. Jurisdictional Areas and Any Proposed Fill on Mitigation Site (*p. 11, 4.E.*)
 - d. Mitigation Site Preparation (*p. 12, 5.C.2*)
(base topo map showing preparation plans)
 - e. Planting Plan (*p. 13, 5.D.4*)
 - plan view of base topo
 - representative cross-sections
 - f. Irrigation Plan (*p. 13, 5.F.3*) (may be on planting plan topo)



Office of Enforcement and Compliance Assurance INFORMATION SHEET

U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance and tools to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Hotlines, Helplines and Clearinghouses

EPA sponsors approximately 89 free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements.

The National Environmental Compliance Assistance Clearinghouse provides quick access to compliance assistance tools, contacts, and planned activities from the U.S. EPA, states, and other compliance assistance providers:
www.epa.gov/clearinghouse

Pollution Prevention Clearinghouse
www.epa.gov/opptintr/library/ppicindex.htm

EPA's Small Business Ombudsman Hotline provides regulatory and technical assistance information.
(800) 368-5888

Emergency Planning and Community Right-To-Know Act
(800) 424-9346

National Response Center (to report oil and hazardous substance spills)
(800) 424-8802

Toxics Substances and Asbestos Information
(202) 554-1404

Safe Drinking Water
(800) 426-4791

Stratospheric Ozone Refrigerants Information
(800) 296-1996

Clean Air Technology Center
(919) 541-0800

Wetlands Helpline
(800) 832-7828

EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

EPA's Home Page
www.epa.gov

Small Business Assistance Program
www.epa.gov/ttn/sbap

Compliance Assistance Home Page
www.epa.gov/compliance/assistance

Office of Enforcement and Compliance Assurance
www.epa.gov/compliance

Small Business Ombudsman
www.epa.gov/sbo

Innovative Programs for Environmental Performance
www.epa.gov/partners

